DHSC, LLC, d/b/a Affinity Medical Center *and* National Nurses Organizing Committee (NNOC). Cases 08–CA–090083, 08–CA–090193, 08–CA–093035, and 08–CA–095833

April 30, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

On July 1, 2013, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party filed answering briefs, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified here,[4] to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.[5]

---

[1] On August 1, 2014, the Respondent filed a Notice of Supplementary Authority referring the Board to *Noel Canning v. NLRB*, 134 S.Ct. 2550 (2014), to support its contention that it had no duty to recognize and bargain because the Board lacked a quorum when the certification issued. This argument is rejected for the reasons stated in *Durham School Services*, 361 NLRB No. 66, slip op. at 1–2 (2014). For the reasons stated in *Benjamin H. Realty Corp*., 361 NLRB No. 103, slip op. at 1 (2014), and *Huntington Ingalls Inc.*, 361 NLRB No. 64, slip op. at 2 fn. 8 (2014), we also reject the Respondent's argument that the Acting General Counsel lacked the authority to issue and prosecute the complaint in this case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

For the reasons stated by the judge, we adopt his findings that the Respondent's Director of Clinical Care Services Susan Kress violated Sec. 8(a)(1) by: threatening to plaster Assignment Despite Objections (ADO) forms on the forehead of any employee who submitted such a form; more closely scrutinizing patient charts; stating how much she would enjoy disciplining a prominent union supporter; and retaliating against employees whom she suspected of submitting ADO forms by reducing the number of nurses in the intensive care unit. In regard to these issues, we note that, contrary to the Respondent's assertions, there is no evidence that nurses do not comply with the Respondent's Event Reporting System, that patient care has been compromised by the submission of ADO forms, or that there are any confidentiality concerns.

[3] We agree with the judge that each of the Respondent's procedural defenses to its refusal to bargain with the Union lacks merit. However, we reject on different grounds the Respondent's defense that an oral ad hoc agreement between the parties gave exclusive jurisdiction to an arbitrator to determine the complaint allegations. The parties have no collective-bargaining agreement setting forth an agreed-upon grievance-arbitration procedure. See, e.g., *Arizona Portland Cement Co.*, 281 NLRB 304, 304 fn. 2 (1986). In addition, deferral is generally inappropriate where the parties have not had "a long and productive collective-bargaining relationship." *United Technologies Corp.*, 268 NLRB 557, 558 (1984). Here, the relationship was neither long nor productive. See *San Juan Bautista Medical Center*, 356 NLRB No. 102, slip op. at 2 (2011), and cases cited there. In adopting the judge's finding, Member Johnson relies on the Federal Arbitration Act's requirement that agreements to arbitrate must be in writing. 9 U.S.C. § 2.

We note that the Board has now considered and rejected identical nonmeritorious procedural defenses raised by the Respondent's counsel in several proceedings. See *Bluefield Regional Medical Center*, 361 NLRB No. 154, slip op. at 2 fn. 6 (2014); *Barstow Community Hospital*, 361 NLRB No. 34, slip op. at 1 fn. 3 (2014); *Fallbrook Hospital*, 360 NLRB No. 73, slip op. at 1 fn. 2, and 13–14 (2014). We also note that the United States Court of Appeals for the District of Columbia Circuit has found the challenge to the Board's Health Care Rule to be without merit. *San Miguel Hospital Corp. v. NLRB*, 697 F.3d 1181 (D.C. Cir. 2012). Given that the Board has now repeatedly rejected these defenses, we advise the Respondent and its counsel that the filing of any further repetitious motions in other Agency proceedings may warrant referral of the matter to the investigating officer for possible disciplinary proceedings under Sec. 102.177 of the Board's Rules and Regulations, 61 Fed. Reg. 65323 (1996). See *Thomas-Davis Medical Centers*, 324 NLRB 29, 31 fn. 9 (1997).

[4] In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) by warning Registered Nurse Ann Wayt on September 5, 2012, by terminating her on September 26, and by subsequently reporting her to the Ohio State Board of Nursing, we find that the strong circumstantial evidence cited by the judge—including the timing of discipline, the inadequate and indifferent nature of the Respondent's investigation of Wayt's alleged misconduct, disparate treatment, and the pretextual nature of the allegations against her—is alone sufficient in this case to establish that the Respondent retaliated against Wayt for her support of the Union. See, e.g., *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4 (2014) (evidence of union animus and pretext includes disparate treatment, shifting explanations, and failure to allow the discriminatees to respond to allegations).

In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(1) by permanently prohibiting union agent Michelle Mahon from its premises, we do not pass on his finding that Mahon did not violate HIPAA by her distribution of a letter to certain employees and other union officials. We agree with the judge's alternative analysis that even if the letter's disclosures violated HIPAA, the record shows that the Respondent's action was discriminatorily motivated by union animus and a desire to retaliate against Mahon for her representation of Wayt.

[5] We have modified the recommended Order to conform to the violations found and our standard remedial language. In affirming the tax compensation and Social Security Administration reporting remedies, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall also require that the Respondent attach a copy of our Decision and Order in requesting withdrawal of its report to the Ohio State Board of Nursing. Finally, we have substituted a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

AMENDED REMEDY

We shall modify the judge's recommended Remedy to require that, in addition to formally withdrawing its reporting of Ann Wayt and, upon her request, forwarding a copy of this Decision and Order to the Ohio State Board of Nursing, the Respondent shall reimburse her, with interest as computed in *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), for the reasonable expenses incurred in connection with the Respondent's unlawfully motivated reporting of Wayt to the Nursing Board. See, e.g., *Norton Audubon Hospital*, 341 NLRB 143 (2004) (citing *Webco Industries*, 337 NLRB 361, 371 (2001), customary for the Board to require a respondent to pay a discriminatee's legal expenses as part of the remedy where such costs have been incurred in connection with the unlawful conduct), enfd. 156 Fed.Appx. 745 (6th Cir. 2005).

In addition, we shall order the Respondent—by Angela Boyle, vice president of human resources, or by the highest ranking management official at its Massillon, Ohio facility—to read the Board's notice to its unit employees during their paid worktime, in the presence of a Board agent at a time and date selected by the Union (absent mutual agreement between the Union and the Respondent). At the Respondent's option, the Board's Order may be read to employees by a Board agent in the presence of a responsible official of the Respondent. Although the General Counsel and the Union did not except to the judge's failure to grant the General Counsel's requested notice-reading remedy, the lack of exceptions does not preclude our imposing such a remedy. See, e.g., *Schnadig Corp.,* 265 NLRB 147 (1982) (remedial matters are traditionally within the Board's province and may be addressed by the Board even in the absence of exceptions). We find that requiring the notice to be read aloud is warranted by the serious and persistent nature of the Respondent's multiple unfair labor practices. Reading the notice to the employees in the presence of a responsible management official serves as a minimal acknowledgement of the obligations that have been imposed by law and provides employees with some assurance that their rights under the Act will be respected in the future. We find that such assurance is clearly warranted under the circumstances of this case. *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008); see also *Vincent/Metro Trucking, LLC*, 355 NLRB 289, 290 fn. 4 (2010).

ORDER

The National Labor Relations Board orders that the Respondent, DHSC, LLC, d/b/a Affinity Medical Center, Massillon, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disciplining, or otherwise discriminating against (including by reporting nurses to the Ohio State Board of Nursing) employees on the basis of their support for the National Nurses Organizing Committee (NNOC) or any other Union.

(b) Refusing to recognize and bargain with the NNOC.

(c) Denying access, previously granted, to union representatives, in retaliation for their representational activities on behalf of bargaining unit employees and motivated by a desire to inhibit employees' union activities.

(d) Restraining, coercing, or interfering, by threats and retaliation, with the union activities of employees, including when they submit Assignment Despite Objection (ADO) forms.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time and per diem Registered Nurses, including those who serve as relief charge nurses at Respondent's Massillon, Ohio hospital.

(b) Within 14 days from the date of the Board's Order, offer Ann Wayt full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Ann Wayt whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the judge's decision.

(d) Compensate Ann Wayt for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(e) Formally withdraw the complaint/report/referral made to the Ohio State Board of Nursing, and forward a copy of the Board's Decision and Order to the Ohio State Board of Nursing.

(f) Reimburse Ann Wayt for all reasonable legal expenses which she may have incurred while defending herself before the Ohio State Board of Nursing, with interest as described in the amended remedy section of this decision.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful September 5 discipline and the September 26, 2012 discharge, and within 3 days thereafter, notify Ann Wayt in writing that this has been done and that the discipline and discharge will not be used against her in any way.

(h) Rescind its prohibition against the Union and/or Michelle Mahon accessing areas of its property to which the Union or Mahon was previously granted access.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at the Respondent's Massillon, Ohio facility, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 5, 2012.

(k) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is read to the employees by Vice President of Human Resources Angela Boyle or by the highest ranking management official at its Massillon, Ohio facility. At the Respondent's option, the notice may instead be read by a Board agent in the presence of Boyle or Massillon's highest ranking management official.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the certification of the Union issued by the Board on October 5, 2012, is extended for a period of 1 year commencing from the date on which the Respondent begins to bargain in good faith with the Union.

Dated, Washington, D.C. April 30, 2015

_____

Mark Gaston Pearce, Chairman

_____

Harry I. Johnson, III, Member

_____

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, discipline, or otherwise discriminate against any of you (including by filing a com-

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

plaint with the Ohio State Board of Nursing) for supporting the National Nurses Organizing Committee or any other labor organization.

WE WILL NOT threaten you with retaliation, increase scrutiny of your charts, or retaliate against you by reducing the number of nurses during your shift if you submit Assignment Despite Objection (ADO) forms, or if you otherwise engage in protected concerted activities.

WE WILL NOT deny access, previously granted, to the Union or any union representatives, in retaliation for their representational activities on your behalf.

WE WILL NOT fail and refuse to recognize and bargain collectively with the National Nurses Organizing Committee as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union, as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time and per diem Registered Nurses, including those who serve as relief charge nurses at Affinity Medical Center's Massillon, Ohio hospital.

WE WILL rescind our prohibition barring access to our facility by Michelle Mahon and/or other union representatives and WE WILL allow Michelle Mahon and other union representatives access to areas of our facility to which they were previously granted access.

WE WILL, within 14 days from the date of the Board's Order, offer Ann Wayt full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Ann Wayt whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Ann Wayt for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this Order, notify the Ohio State Board of Nursing that we are withdrawing our complaint/report/referral of Ann Wayt to that agency, and WE WILL forward a copy of this Decision and Order to the Ohio State Board of Nursing.

WE WILL reimburse Ann Wayt for all reasonable legal expenses which she may have incurred while defending herself before the Ohio State Board of Nursing, with interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful warning given to Ann Wayt on September 5, and her unlawful discharge on September 26, 2012, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the warning and discharge will not be used against her in any way.

DHSC, LLC, D/B/A AFFINITY MEDICAL CENTER

The Board's decision can be found at www.nlrb.gov/case/08-CA-090083 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Sharlee Cendrosky, Esq., for the General Counsel.
Bryan T. Carmody, Esq., of *Glastonbury, Connecticut; Donald T. Carmody, Kaitlin Brundage, Carmen DiRienzo, Esqs.,* for the Respondent.
M. Jane Lawhon, Esq., of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Cleveland, Ohio, April 29–May 3, 2013. The Charging Party Union, the National Nurses Organizing Committee (NNOC), filed the initial charges in these cases on September 26, September 27, November 13, 2012, and January 7, 2013. The General Counsel issued the most recent version of the complaint on March 29, 2013.

The complaint alleges that Respondent, Affinity Medical Center, has refused to recognize and bargain with the NNOC in violation of Section 8(a)(5) and (1). Based on an election conducted on August 29, 2012, the Union was certified on October 5, 2012, as the exclusive collective-bargaining representative of all full-time and regular part-time and per diem Registered Nurses, including those who serve as relief charge nurses at Respondent's Massillon, Ohio hospital.

The complaint also alleges that Respondent violated Section 8(a)(3) and (1) in disciplining unit employee, RN Ann Wayt on September 5, 2012, in terminating Wayt on September 26 and reporting her to the Ohio State Board of Nursing.

The complaint further alleges that Respondent violated Section 8(a)(1) in; (1) denying the Union access to its property in retaliation for a letter sent by union organizer Michelle Mahon on behalf of Ann Wayt; and (2) by Jason McDonald, director of the Orthopedic and Therapy Department, in threatening Wayt with termination for asserting her "Weingarten" rights; and (3) by Susan Kress, manager of its Cardiovascular Intensive Care Unit, by interrogating an employee about her union interest, threatening employees who submitted the Union's ADO (Assignment Despite Objection) forms and more closely scrutinizing employees' work and imposing more onerous working conditions in retaliation for employees' union activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Affinity Medical Center, operates a hospital in Massillon, Ohio. It is part of the Community Health System of hospitals. Respondent derives gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $50,000 from outside of Ohio. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the NNOC, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Refusal to recognize and bargain with the Union

There is no doubt that Respondent refused to recognize and bargain with the Union. Its only defense is that the Board's certification of the Union was improper. I find, to the contrary, that the Board's certification was proper, and thus Respondent's refusal to bargain violated Section 8(a)(5) and (1) and the Act.

On August 22, 2012, Respondent and the Union entered into a consent election agreement (Case 08–RC–087639). They waived the right to a hearing and agreed to the conduct of an election on August 29, 2012, for a bargaining unit consisting of all full-time and regular part-time and per diem Registered Nurses, including those who serve as relief charge nurses at Respondent's Massillon, Ohio hospital.

Within 7 days after the Regional Director has approved a consent election agreement entered into by the parties, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, makes this information available to all parties in the case, *Excelsior Underwear,* 156 NLRB 1236 (1966). Respondent submitted such a list.

Voting at Respondent's facility took place August 29, 2012, during three time periods: 6:30 a.m. to 9 a.m.; 11 to 1 p.m., and 6:30 to 9:30 p.m. The ballots were counted at the conclusion of the election on August 29. Two hundred and three of the 213 eligible voters cast ballots. One hundred nurses voted for the Union; 96 voted against it. On September 5, 2012, Respondent filed objections to conduct affecting the results of the election. The Board Agent challenged the ballots of 7 voters; 6 whose names did not appear on the *Excelsior* list of eligible voters submitted by the Respondent. One of the voters whose name was not on the *Excelsior* list was Ann Wayt, whose termination 4 weeks later constitutes a large part of the instant case. Wayt had worked at the Massillon hospital since 1987 except for a lay-off between 1998 and 2000. No explanation appears in this record as to why Wayt's name was not on the *Excelsior* list.

Respondent did not submit evidence or a statement of position with regard to the challenged ballots. The Union argued to the Regional Director that Wayt and three others whose ballots were challenged, were relief charge nurses explicitly included in the bargaining unit. Since there was no evidence before the Regional Director that Wayt and three other nurses were statutory supervisors, he ordered their ballots opened and counted. Although the result of counting the challenged ballots does not appear in this record, it obviously did not alter the fact that a majority of unit members who voted chose to be represented by the NNOC.

On September 7, 2012, the Regional Director advised Respondent that a failure to timely submit evidence in support of its objections would result in those objections being overruled. Based on Respondent's failure to present such evidence, the Regional Director overruled them in his report of September 21, 2012.

On October 5, 2012, the Board certified the Union as the bargaining representative of unit employees. Steve Matthews, a union representative, submitted written and oral bargaining demands to Respondent's attorney, Donald Carmody on October 16, 2013. Carmody told Matthews that he would never bargain with the Union with respect to Affinity or other hospitals in West Virginia and Barstow, California, at which the Board had also certified the Union.[1]

Union counsel Jane Lawhon followed up Matthews' communications with a letter to Donald Carmody on November 2, 2012. Respondent has not responded to the Union's bargaining demands, other than via Donald Carmody's oral statements on October 16.

The Board has a long-standing policy of not allowing parties to relitigate representation case issues in the absence of newly discovered or previously unavailable evidence or special circumstances, e.g., *Leisure Chateau Care Center,* 330 NLRB 846 (2000), relying on *Pittsburgh Plate Glass Co., v. NLRB,* 313 U.S. 146, 162 (1941). In view of this policy, I granted the Union's motion in limine and barred Respondent from offering evidence in support of its first three affirmative defenses These defenses are: (1) the certification was issued pursuant to the Board's Health Care Rule, and is thus invalid and unenforceable;[2] (2) the election was conducted pursuant to the consent

[1] Donald Carmody, who represented Respondent the day that Matthews testified in this case, did not contradict Matthews' testimony.

[2] The United States Court of Appeals for the District of Columbia Circuit found "zero merit" to the challenge to the validity of the health

election agreement AND an oral "ad hoc" agreement by which the parties gave exclusive jurisdiction to determine challenged ballots and objections to an arbitrator; and (3) that an arbitrator possesses exclusive jurisdiction over the allegations in the complaint.

In my order of April 26, 2013, granting the Union's motion in limine, I concluded that Respondent had waived these defenses by entering into the consent election agreement and failing to submit evidence or a position statement to the Regional Director—despite a specific admonition regarding the need to do so.[3] There is no indication in the Regional Director's Report of September 21, 2012, that he was advised of Respondent's reliance on the "ad hoc oral agreement." I therefore reiterate my conclusion that Respondent has waived all three defenses.

Respondent's fourth affirmative defense

Respondent's fourth affirmative defense is that the Charging Party affiliated with another labor organization after the issuance of the certification and that as a consequence there is a lack of continuity of representative. I granted the Union's petition to revoke Respondent's subpoenas regarding this issue.[4] However in my order granting the motion to limine I stated that I would allow Respondent to present evidence that it relied upon in writing in refusing to recognize and bargain with the Union on the basis of facts known to it at the time of its reliance. I also stated that I might allow Respondent to present other evidence on this issue that it already had in its possession. Respondent did not avail itself of the opportunity to present any evidence on the issue of continuity of representation, Tr. 1176–1198. It also declined my suggestion that it make an offer of proof, Tr. 1197–1199.[5]

I regard the fourth affirmative defense to be a "red herring." The first thing to note about this defense is that NNOC's affiliation with the NUHW occurred after Respondent refused to bargain with the NNOC at Affinity.[6] An employer is not permitted to defend the propriety of an earlier refusal to bargain by relying on subsequent events that had nothing to do with the refusal, *New York Center for Rehabilitation Care,* 346 NLRB 447 (2006). In addition to the fact that Respondent refused to bargain with the Charging Party for several weeks before the affiliation in question, Respondent has waived its fourth defense by declining to introduce any evidence in support of this defense, or even making an offer of proof. This distinguishes the instant matter from *Bluefield Hospital Co.,* and *Greenbrier VMC, LLC,* 359 NLRB No. 137 (2013), where the Board, in denying a motion for summary judgment, permitted the hospitals to submit such evidence because they apparently did not have an opportunity to present evidence on the affiliation issue. Finally, there is no support in Board law for the merits of Respondent's fourth defense.

In *NLRB v. Food & Commercial Workers Local 1182 (Seattle First National Bank),* 475 U.S. 192 (1986), the Supreme Court held that the Board cannot discontinue an employer's obligation to bargain based on the union's affiliating with another union unless the Board determines that the affiliation raises a question of concerning representation.

Board law on this affiliation issue is as follows: Respondent, as the party seeking to avoid its bargaining obligation, has the burden of demonstrating that a change in the affiliation of the Union is sufficient to raise a question of affiliation, *Sullivan Brothers Printers,* 317 NLREB 561, 562 (1995). Since Respondent failed to present any evidence on this issue, it has failed to prove its affirmative defense. In *Raymond F. Kravis Center for the Performing Arts,* 351 NLRB 143, 146 (2007), the Board held that the lack of a membership vote concerning

care rule by another CHS hospital represented by Respondent's counsel, *San Miguel Hospital Corp. v. NLRB,* 697 F. 3d 1181 (D.C. Cir. 2012).

[3] The Board reached the same conclusion in *Bluefield Hospital Co.,* and *Greenbrier VMC, LLC,* 359 NLRB No. 137 (2013), regarding the "ad hoc" arbitration agreement with the Charging Party in this case. The consent election agreement in the representation case between Affinity and the NNOC contains the exact same language as that in the Bluefield and Greenbrier cases. This language was relied upon by the Board in concluding that these other Community Health System hospitals waived their rights to have the Board review the Regional Director's actions in the representation hearing.

[4] Respondent's subpoenas are largely directed to the financial relationship between the Charging Party NNOC and the National Union of Healthcare Workers (NUHW). They include requests for information concerning: (1) loans or payments between the Charging Party NNOC and the NUHW; documents leading to the affiliation agreement; documents pertaining to the run-up to the affiliation, changes in the identity of the Charging Party's Executive Board and/or officers and any documents by which the NNOC informed unit members at Affinity of any planned affiliation between the NNOC and NUHW.

The scope of the subpoena and Respondent's failure to introduce any evidence regarding the affiliation leads me to the conclusion that Respondent did not have any factual basis for refusing to recognize the Union on the basis of the affiliation. I would note that Respondent could have, with regard to subpoena items 21–22, presented evidence that unit members were totally unaware of NNOC's plans to affiliate with the NUHW as of the date of election. Respondent called Cinda Keener, a prominent unit opponent of the Union, as a witness and certainly could have elicited from her the fact that the affiliation was a total surprise, if that were the case. Whether or not such evidence would have been relevant to this proceeding is, however, debatable.

Respondent's subpoenas sought absolutely no information regarding whether the voice that unit employees had in the affairs of the Union would change at all as a result of the affiliation.

[5] As to the legitimacy of Respondent's reasons for not even making an offer of proof, see ALJ Laws' decision in *Fallbrook Hospital Corp.,* JD (SF) 21–13 (May 16, 2013) and the order of United States District Court Judge Gonzalo P. Curiel of the Southern District of California in Case No. 13CV1159-GPC(WMC) (June 11, 2013) granting a temporary injunction under Section 10(j) of the Act, ordering Fallbrook to bargain with the California Nurses Association/National Nurses Organizing Committee (CNA/NNOC).

Finally, I deem the arguments set forth at pp. 29-36 of Respondent's brief regarding the affiliation of NNOC with a labor organization that represents employees other than nurses, to be simply irrelevant to this case. The Charging Party was certified as the bargaining representative of Respondent's registered nurses at Affinity. The relevance of the fact that it is affiliated with an entity that may represent other classifications of employees elsewhere escapes me.

[6] Respondent's refusal to bargain with NNOC at Affinity preceded NNOC's affiliation with the NUHW. That affiliation apparently occurred on January 1, 2013, pursuant to an agreement signed on November 30, 2012 (Jt. Exh. 1, p. 3), *Fallbrook Hospital Corp.,* JD (SF) 21–13 (May 16, 2013).

union affiliation is insufficient to raise a question concerning representation. In determining whether there is a lack of continuity of representation after an affiliation, the Board considers whether the affiliation resulted in a change that is sufficiently dramatic to alter the union's identity, *Mays Department Store,* 289 NLRB 661, 665 (1988), enfd. 897 F.2d 221 (7th Cir. 1990). In the instant record there is no evidence bearing on this issue.

The affiliation of a smaller local union with a larger international union, and the increase in bargaining power associated with such an affiliation, does not, by itself, cause a discontinuity of representation such as to raise a question concerning representation, *CPS Chemical,* 324 NLRB 1018, 1022 (1997). In assessing continuity questions, the Board considers the totality of the circumstances, *Mike Basil Chevrolet,* 331 NLRB 1044 (2000), such as whether unit employees will continue to have a voice in their collective-bargaining representative after affiliation. To the extent there is any evidence in this record on the issue, it is that unit employees are represented on the union's bargaining committee and thus continue to play a role in their representation by the Union.

Discipline and Termination of RN Ann Wayt; Report to Ohio State Board of Nursing (Complaint paragraph 15)

Registered Nurse Ann Wayt was hired at the Massillon, Ohio hospital now called Affinity Medical Center, in 1987.[7] With the exception of a lay-off from about 1998–2000, she worked at the hospital continuously until September 26, 2012, when she was terminated. Until September 5, 2012, Wayt had never been disciplined by the hospital.[8]

In September 2011, Wayt was recruited to work in Respondent's newly opened orthopedic ward by its Clinical Manager, Paula Zinsmeister. At least until August 29, 2012, Respondent's managers considered Wayt to be a "very good nurse" (Tr. 754). She received a prestigious award for her job performance in 2008.

During the week prior to the August 29 representation election, the Union circulated a flyer, GC Exh. 11, on which Ms. Wayt's photograph was prominently displayed on the front page. Although the photos of about 35 unit employees were displayed on the flyer, Wayt was one of only three nurses who were also quoted on the flyer giving the reasons she supported the Union. The other two employees quoted did not work in the orthopedic unit. Of the 35 employees depicted on the flyer, 8 worked in the orthopedic unit. Thus, the flyer indicates that Wayt was the leading supporter of the Union in the hospital unit in which union support was most pronounced.

This flyer was passed around and discussed at managers' meetings during the week prior to the election. The flyer was submitted to hospital management for approval on or about August 22 (GC Exh. 11, R. Exh. 30, Tr. 1277).[9] This flyer was also blown up and prominently displayed in the hospital cafeteria on posterboard that was 35.5 inches by 44 inches.

Respondent's managers, including William Osterman, the chief nursing officer, Jason McDonald, the director of orthopedic and therapy services and Susan Kress, director of critical care services, were aware that Wayt supported the Union prior to the election (Tr. 116117, 151). Osterman, McDonald and Kress had seen Wayt's picture on the union flyer during the week prior to the election.

Respondent contends at page 40–41 of its brief that the record is barren of any evidence that Paula Zinsmeister, Wayt's direct supervisor, was aware of Wayt's support for the Union. In fact, the record provides plenty of reasons to infer such knowledge. While Zinsmeister was on vacation the week of August 27–31, the union's flyer was circulated and discussed at management meetings during the week of August 20–24, which Zinsmeister attended (Tr. 181, 117–121). Moreover, I infer that when Zinsmeister returned from vacation, she was cognizant of the fact that it was the employees in her orthopedic unit that gave the Union its margin of victory in the representation election, and that Wayt was the most prominently depicted of her employees on the union flyer.

On August 28, 2012, Ann Wayt began her shift on the orthopedic ward at about 7 a.m. This unit has a capacity of 10 patients. At the start of the shift on August 28, there were 9 patients, who were cared for by Wayt and another RN, Duana Nadzam. They were assisted by at least one patient care technician, Sam Burgett.[10]

Sometime around 8:47 a.m. Wayt talked to an Emergency Room Nurse, Laura Jenkins.[11] A 10th patient, "Mrs. P" was about to be transferred from the emergency department to the orthopedic unit. P had arrived at the hospital in the very early morning of August 28 from a nursing home. She apparently fractured her right hip in a fall on August 17 (CP Exh. 1).

Jenkins noted that P appeared confused and was taking off

[7] The hospital was called Doctors Hospital of Stark County (DHSC). It became part of the Community Health Services system in about 2009.

[8] Respondent introduced R. Exh. 1, purporting to be evidence of a verbal warning given to Wayt on March 12, 2010. I received this exhibit over the objection of the Charging Party, Tr. 1045. However, I credit Wayt's testimony that she never saw this document and that she was not disciplined as suggested by the document. I received R. Exh.1 as a business record despite the fact that it does not meet the requirements of Rule 803(6) of the Federal Rules of Evidence to be admitted as a "business record" or record of regularly conducted activity. The document is dated February 22, 2010, and purports to have managers' signatures of March 12, 2010. The misconduct recited in the document allegedly occurred on November 15, 2009. To qualify under Rule 803(6) the record must be made at or near the time of the event by someone with knowledge of the event. R. Exh. 1 was seemingly prepared 4 months after the event in question and there is no indication as to whose knowledge it is based upon. Moreover, the lack of any explanation as to why Ms. Wayt was being disciplined for an event that occurred 4–5 months previously renders R-1 a document whose circumstances of preparation indicate a lack of trustworthiness.

[9] There was at least one modification to the flyer that was circulated and displayed in the cafeteria from that submitted to the Respondent. The photograph of nurse EB, who was later disciplined, but not terminated by Respondent, was cropped from a photo of her with two other nurses, compare GC Exhs. 11 and 14 with R. Exh. 30. The photograph of nurse NV, who was terminated by Respondent in January 2013 appears on both versions of the flyer as it was circulated and displayed in the cafeteria.

[10] Neither Nadzam nor Burgett testified in this proceeding.

[11] Jenkins initials hospital documents LJE. She did not testify in this proceeding.

her hospital gown and pulling equipment. When she reported this to Wayt, one or both recommended that a sitter be assigned to watch P in the orthopedic unit so that Ms. P would not injure herself.[12] Wayt told Jenkins to get a physician's order for a sitter per hospital policy. She also told Jenkins that the sitter needed to be available upon P's arrival in the orthopedic unit because Wayt could not spare any of her staff to stay with P. There is no dispute that the orthopedic unit was very busy on August 28.

There was some difficulty in getting a sitter, so Wayt called Susan Kress, Respondent's director for critical care services. Kress was filling in this week for Paula Zinsmeister, the clinical manager of the orthopedic department, who was on vacation.

The first thing Kress said to Wayt was, "you better not be refusing a patient" (Tr. 226). There is no credible evidence that Wayt refused or tried to refuse accepting a patient on August 28. Respondent's evidence on this point is entirely hearsay. Kress typed notes which state that at a flash meeting at 0900 she was informed that Wayt refused a patient from the ED unless there was a sitter, and that she told Wayt this was unacceptable (GC Exh. 7, p. 13). Kress did not testify as to who told her this, thus this evidence is hearsay and not credible. Moreover, this is inconsistent with Kress' testimony at Transcript 659 that Beth Varner, the manager of house supervisors, called her to tell Kress that according to the emergency department nurse, Wayt refused to take the patient. Neither Varner nor Laura Jenkins, the emergency department nurse, testified in this proceeding. Jenkins' notes (CP Exh. 1, p. 4), do not mention any such refusal.

Kress claims to have typed this portion of the notes on August 28. As the Charging Party's counsel points out, Kress would have had no reason to document anything about Wayt's performance on August 28 (Tr. 164–166). Thus, if Kress in fact typed portions of these notes on August 28, it indicates that Respondent was already looking for a pretext to retaliate against Wayt for her support for the Union. At no point during this hearing did Kress attempt to disavow her testimony that she started her documentation of Wayt on August 28. Indeed, her testimony at Transcript 657–663 also suggests that Kress started building a case against Wayt on the morning of August 28, before she looked at Mrs. P's chart or had any basis for suspecting a falsification of Mrs. P's chart.[13]

The patient was brought up from the Emergency Department on the first floor to the orthopedic unit on the third floor and taken to room 3420 at about 9:15 a.m. by Kress and a nurse from the emergency department. Within minutes Rhonda Smith, an RN from the open heart (cardiovascular) operating room, arrived in room 3420 to serve as the sitter for Mrs. P. Kress left the room within 10–20 minutes of the patient's arrival in the orthopedic ward and did not return during the rest of the day.

In the morning, Smith positioned herself close to the patient facing the window of the room, with her back to the door to the hallway. At about 10 Wayt entered the patient's room, gave Smith a stack of papers and talked to the patient's family. Wayt also testified that Jonalee Lesjack, who was to relieve Smith during the day, came into the room at this time, Tr. 228. I neither credit nor discredit Wayt's testimony regarding Lesjack's presence at 10. At that time Wayt asked the patient's son if he had power of attorney.

No later than 11 a.m. Rhonda Smith went to lunch. She was relieved as a sitter by Jonalee Lesjack, an RN who also works in the cardiovascular operating room. Respondent Exhibit 15, a sitter checklist form, indicates that Lesjack was in room 3420 at 11 through at least noon. While Lesjack was in room 3420, Wayt entered the room and put IV tubing on the IV pump. Wayt talked to the patient's son for 3–4 minutes.

The head-toe assessment

A fact in dispute in this case is whether Wayt did a head-toe assessment of the patient. Wayt testified that after she spoke with the patient's family and hung the IV bag she left the room to get her stethoscope. According to Wayt, when she returned a few minutes later, the patient's family had left the room and Lesjack asked to use the restroom. Wayt testified that while Lesjack was out of the room, she performed the head-toe assessment (Tr. 230–231).

Lesjack testified that she did not use the restroom while serving as the patient's sitter and did not leave the patient's room, until Smith returned from lunch (Tr. 640–642). I cannot credit either Wayt or Lesjack on this point and cannot conclude one way or another whether or not Way performed a head-toe assessment while Lesjack was out of the room. As to the resolution of this case, the important points are (1) Respondent has not established that Wayt did not perform the head-toe assessment and (2) Respondent had no basis for so concluding when prior to September 12, it decided to terminate Wayt.

There are a number of reasons not to credit Lesjack's testimony. First of all, nobody from management talked to Lesjack any earlier than September 19, a week or more after Respondent had decided to terminate Wayt's employment (Tr. 644, 651–52, 680, 831). Her testimony indicates that she may not have total recall of what transpired on August 28. Lesjack testified that, "I probably would have used the restroom before I went, being that it was only for a lunch relief" (Tr. 641). Thus, Lesjack did not remember whether she used the restroom just before coming to room 3420 or not. If not, it is possible that she did take the opportunity to use the restroom while Wayt was with the patient. The sitter's log and the hearing testimony of Lesjack and Smith also establishes that Lesjack was in the patient's room longer that either stated in their September 24 statements to Respondent (compare GC Exh. 7, p. 14 and 15 with R. Exh. 15 and Tr. 588–592, 646, 651) [Lesjack was in the room for at least one hour compared to ½ hour in

[12] Wayt indicated that Jenkins recommended that Mrs. P have a sitter, Tr. 224. Jenkins' notes in CP Exh. 1 at 8:47 a.m. can be read for the proposition that Wayt recommended the sitter. However, since the notes are written in bullet point fashion without punctuation, this is not unambiguous.

[13] Kress is not a credible witness. At this hearing she testified that Rhonda Smith told her that Smith saw Wayt only twice while she was acting as sitter, Tr. 675. I am confident that Smith told Kress no such thing. Smith saw Wayt at least 4 times; at 10, noon, about 2 and about 3. Kress' testimony regarding the reasons she reduced the number of nurses in the intensive care unit on January 3, 2013, is also, as explained later in this decision, not credible.

both statements]

More importantly, the circumstances surrounding Respondent's contacts with Lesjack suggest not an unbiased investigation, but an inquiry from her employer that was focused on getting support for the decision it had already made to terminate Wayt. Lesjack signed an unsworn statement for Respondent on September 24 (GC Exh. 7, p. 15). This statement was modified after it was first presented to Lesjack. There is no evidence in this record as to who prepared the statement and what information they used in preparing the original statement or the amended version (Tr. 645, 806–811, 823–824). The only persons who interviewed Lesjack were Kress, McDonald and Zinsmeister. None of them testified that they prepared Lesjack's statement. Thus, I find that the person who prepared the document had never spoken to Lesjack.

In this regard it is important to note that when Respondent first talked to Lesjack, it knew precisely what claims by Wayt it needed to rebut to sustain its decision to terminate her. Union Organizer Michelle Mahon sent Respondent a letter on Wayt's behalf on September 19. It was received by Respondent on the same day. Mahon stated:

> At some point between approximately 11 AM and 1 PM, Ann saw a different RN had come to relieve Rhonda as the sitter when Ann came into the patient's room. Ann assumed that Rhonda was on her meal break. This nurse was white, in her 30's, tall, slightly heavy-set in build, with short reddish-brown hair. Ann does not now recall her name. This nurse asked if she minded staying in the room with the patient while the nurse went to the restroom. Ann agreed and took the opportunity while she was in the patient's room to do a head-to-toe assessment…To the best of Ann's recollection, she was just finishing up the assessment, listening to the patient's lungs, when the sitter returned from the restroom.

R. Exh. 8, p. 3.

Wayt and Mahon would reasonably expect that Respondent would make an effort to talk to the relief nurse. An unbiased investigation would have been an open ended inquiry to Lesjack as to what she recalled, without prompting. It is unlikely that this is what transpired.

Jason McDonald presented a signed statement for Lesjack. The record does not indicate who prepared it.[14] As initially prepared, it was not, according to Lesjack, completely accurate. McDonald or someone else in management made changes and brought the unsworn statement back to Lesjack (Tr. 645–646). She signed it on September 24. There is no evidence as to what changes were made or whether or not they were material to this case.

However Lesjack's testimony indicated that Lesjack did not address whether or not she used the bathroom when she first was interviewed by Paula Zinsmeister and Jason McDonald. Lesjack testified that she talked to Paula Zinsmeister and Jason McDonald prior to talking to Kress. Lesjack testified that Kress, "peeked her head into the CVOR and asked if I went to the restroom while I was there" (Tr. 644–645). Kress' testimony at Tr. 680 also establishes that whether or not Lesjack went to the restroom during her shift as a sitter did not come up in her initial interview. This raises the question as to whether the change to the statement she gave to Respondent was precisely on this issue.

Moreover, there is a motive for Lesjack to provide Respondent the account of her activities that it desired. Respondent's policy for sitters (or patient observers) states that the sitter/observer, "may step out of the patients room when licensed care provider is in attendance, but must remain within visual distance of patient door to readily resume observation role" (R. Exh. 21 par. c. 5). Thus, if Lesjack used the restroom, as claimed by Wayt, she would have been in violation of this policy—giving her some motivation to deny having done so.

Rhonda Smith returns to Room 3420

There is a dispute as to whether Ann Wayt performed hourly rounding with regard to this patient. However, hourly rounding, which includes checking on the patient's level of pain, positioning, toilet needs, accessibility of the call button, phone and water, was performed by PCT Sam Burgett at 9:30, 10, and 11 a.m. and by Smith at noon, 1, 2, and 3 p.m. (R. Exh. 14, Tr. 573–582). Relief sitters indicated that they performed hourly rounding at 4 p.m. and every hour afterwards until Wayt's shift ended at 7:30 p.m.[15]

Rhonda Smith saw Wayt enter the patient's room at about noon. Wayt injected morphine into the patient's IV with a syringe. At about 1:55 to 2 p.m. Smith summoned Wayt to the patient's room via the call button. The patient needed a diaper change. Wayt sent Sam Burgett to room 3420 with a fresh diaper and linens. Either Burgett or Smith, or both, changed the patient's diaper and beddings.[16] At about 3 p.m. Smith saw Sam Burgett and asked him when she was going to be relieved. Wayt came to room 3420 and spoke with Smith. Smith was relieved as sitter at about 4:15. At 4:30 p.m. Wayt administered another dosage of morphine to the patient. Respondent's termination of Wayt relates solely to the period that Smith and Lesjack were the sitters for Mrs. P. Wayt's care and documentation after Smith left (4:15 to 7:30 p.m.) the patient are not at issue.

The next morning, August 29, which was the day of the representation election, Smith complained to Jeremy Montabone, the manager of the open heart unit, about the fact that she had not been relieved on time. More specifically:

> I told him that I was concerned because no one was there to relieve me at [on] time and had I been on call for open heart, no one would have known where I was to get in touch with me because my phone was down in the locker, my locker, and I was up on the floor.

[14] The same is true for the September 24 unsworn statement of Rhonda Smith.

[15] The rounding log for 4 p.m. and 5 p.m. is initialed by someone other than Smith, Burgett, or the relief sitter, Vicki Koscovska. Koscovska initialed the form at 6 and 7, R. Exh. 14. Wayt testified that she entered the room at 1 p.m. and did not see Smith. I find Smith to be generally a credible witness and thus find Smith was present in Mrs. P's room at 1 p.m.

[16] Susan Kress testified that Smith is not allowed to touch a patient, Tr. 157. However, Smith clearly did so to check the patient's diaper, Tr. 583.

> And, but no one was really coming in to see the patient other than the people that were sitting.

Tr. 610.

Although, I generally find Smith a credible witness, the last sentence is clearly not accurate. It is uncontroverted that Wayt was at the patient's bedside at 10, 11, and at noon and at least part way into the room at 3. It is also uncontroverted that Sam Burgett, the patient care technician, was in the room twice at about 10, and at 11 and at about 2 p.m.[17]

Respondent does not contend that Mrs. P was harmed or that her health was compromised by anything that Wayt did or did not do (Tr. 206, 963). Apparently, neither did Rhonda Smith. Respondent's nurses are supposed to fill out an Event Reporting Form for events that compromise patient safety. Smith did not fill out such a form (Tr. 947–949, 966). In any event, there was a Registered Nurse within a few feet of Mrs. P at all times from 9:15 a.m. to 4:15 p.m. The one time that Rhonda Smith summoned Wayt with the call button, she responded promptly.

Montabone told Smith he would talk to Susan Kress. Kress conferred with Jason McDonald and began an investigation of Wayt's conduct. She reviewed the chart for Mrs. P. Kress concluded that Wayt's documentation on the chart was inaccurate in a number of respects: a cough noted by the night nurse who relieved Wayt was not documented by Wayt. There was no documentation regarding a skin tear in the crease of the patient's elbow or a bruise on her heel. Wayt documented a head to toe assessment at 0900, prior to the time that Mrs. P arrived on the orthopedic ward.[18]

On August 29, Kress shared her concerns with Chief Nursing Officer Bill Osterman. Sometime between August 30 and September 5, Kress interviewed Rhonda Smith and Sam Burgett (Tr. 628–629, 674). So far as this record is concerned, Kress did not obtain any relevant information from Burgett. Kress did not take notes of her conversation with Smith. However, she testified that Smith told her that:

> Rhonda was very concerned that a nurse did not go into the room, did not assess the patient, that no nurse did hourly rounds on the patient, that the only time she did see a nurse was when she put on the call light because the patient was having extreme pain and because she needed a diaper because the patient needed [to be] changed.

Tr. 675 [Kress indicated that Smith saw Wayt only twice].

Kress' recollection is incorrect in several respects. First of all, Smith did not know whether Wayt assessed the patient because she was not in the room for at least an hour while she went to lunch. Moreover, Smith did not tell Kress that Wayt did not do an assessment. As Smith testified, "Plus, when I went to lunch she could have done it and I didn't know" (Tr. 614).[19]

It is also not true that no nurse did hourly rounds on Mrs. P. Smith indicated on R. Exh. 14 that she performed the hourly rounding at 1, 2, and 3 p.m. Sam Burgett, the PCT, performed the hourly rounding at 9:30, 10, and 11.

Smith testified that she saw Wayt in the patient's room at 10; at noon administering morphine; at about 2 p.m. (there is a dispute as to whether Wayt entered the room or not) and at 3 p.m. Lesjack, who was not interviewed until September 19, saw Wayt in the patient's room at 11.[20]

Kress testified that she met with CNO Osterman again on August 31. He told Kress that he would report her findings to HR Vice President Angie Boyle. Kress met with Paula Zinsmeister and Jason McDonald on September 5. She played no further role in the investigation of Wayt until after Respondent received a September 19 letter from union organizer Michelle Mahon on Wayt's behalf. Kress testified that she went to Jonalee Lesjak "and asked her if she did relieve Rhonda to go to the bathroom and she told me no" (Tr. 680).

Kress talked to Smith between August 30 and September 5 (Tr. 611). There is no written record of what Smith told to Kress or precisely when this interview took place.[21] Smith testified that she told Kress "the same thing I had told Jeremie," Tr. 612. No other management person met or interviewed Smith about the events of August 28 until September 13 and no management person talked to Lesjak until September 19, after Respondent had already decided to terminate Wayt's employment (Tr. 831).

Wayt's interaction with Pharmacy Director John Perone leading to a written warning

On the morning of August 30, Respondent's Pharmacy Director, John Perone, went to the Orthopedic ward to refill the Pyxis machine.[22] This machine dispenses medications and keeps an accurate count of what should be in the machine and what is actually there. Perone noticed there was a discrepancy regarding the quantities of Percocet, a narcotic pain killer. The machine indicated it was last accessed by Ann Wayt. Perone

[17] The General Counsel and Union suggest that the testimony of both Smith and Lesjack is influenced by their opposition to the Union. There is no direct evidence as to whether either supported or opposed the Union in the representation campaign. It is true, however, as demonstrated by the union flyer, that the Orthopedic Unit, in which Wayt worked, was a stronghold of union support. The pictures of 8 orthopedic employees appear on that flyer, GC Exh. 11; there are no pictures of any employees from the open heart (Cardiovascular) operating room to which Rhonda Smith and Lesjack were assigned. There is no evidence of any open union support amongst the staff working in their unit.

[18] Kress conceded that a patient may have a cough at one time and not at another. She also conceded that the emergency department nurses also did not document the bruise on the patient's heel.

[19] I infer the "it" Smith referred to at Tr. 614 is the head-toe assessment.

[20] Wayt testified that she went to the patient's room at about 1:00 p.m.to check on the level of the patient's pain after administering morphine and that she talked to the patient's family. She testified that Lesjack, not Smith was in the room at 1 p.m., Tr. 234, 352. The patient's chart indicates that Wayt gave the patient MMSO4 at about 1 p.m., GC Exh. 7, p. 23. This is not noted on the medication administration record, R. Exh. 7. As stated previously, I do not credit this testimony.

[21] Kress did not present Smith with notes of their meeting to review for accuracy, Tr. 629.

[22] Wayt testified this occurred on August 29. However, on the basis on GC Exh. 18, I conclude this event occurred on August 30.

demanded that Wayt rectify the discrepancy immediately. Perone could have rectified the discrepancy without Wayt's assistance and Respondent's policy regarding the Pyxis machine does not require that discrepancies be rectified until the end of a shift.

Wayt told Perone that she was too busy to fix the discrepancy immediately. Wayt testified that he ordered her to do so and that she complied (Tr. 252). Perone's August 30 email, R. Exh. 19, indicates he fixed the discrepancy by himself. He did not so testify under oath. Thus, Wayt's testimony is not contradicted by any nonhearsay evidence. Moreover, whether or not Wayt assisted in reconciling the Pyxis machine discrepancy is not crucial to resolution of this complaint allegation.

Almost immediately, Perone emailed Wayt's immediate supervisor, Paula Zinsmeister, and Chief of Nursing Operations Bill Osterman (GC Exh. 18, p. 2). Later on August 30, Wayt apologized to Perone (Tr. 252).

On the morning of September 5, Perone sent another email to Angie Boyle, vice president of human resources, recounting his interaction with Wayt on August 30. He did not mention the fact that Wayt apologized to him the same day. Jason McDonald called Wayt into his office on September 5 and presented her with a written warning. (R. Exh. 16.) Paula Zinsmeister was also present. The warning states that Wayt would not cooperate in the reconciliation as is required and that Perone fixed the discrepancy without her input. It appears from the record that this may be inaccurate (Tr. 252). The warning also did not mention Wayt's uncontradicted testimony that she apologized to Perone later the same day.

Finally, the warning indicates that Wayt failed to comply with Hospital Policy. I infer that refers to PCS-30, Respondent's Drug Distribution Policy, the only policy referenced in the disciplinary notice. Wayt did not violate this policy, which allows for discrepancies to be reconciled at the end of the shift (Tr. 513–514).

Events of September 5–12 as they relate to Ann Wayt's termination

During the meeting at which McDonald and Zinsmeister presented Wayt the written warning, McDonald told Wayt that Respondent was auditing Mrs. P's chart. They did not indicate to Wayt that they suspected any misconduct on her part. Wayt told them that the chart was accurate to the best of her recollection. McDonald asked Wayt to initial certain places on Mrs. P's chart. Then he and Zinsmeister went to CNO Bill Osterman. Osterman sent McDonald and Zinsmeister to HR VP Angie Boyle.

Osterman testified that at this point, on September 5, after the meeting with McDonald and Zinsmeister, he decided to terminate Wayt's employment. He testified that he did so on the basis of falsification and neglect of the patient. Osterman based his conclusion that the patient had been neglected due to the lack of a head to toe assessment (Tr. 927–930). At this point, Wayt had not been apprised of the allegations against her. Additionally, Respondent could not have known whether or not Wayt had done a head to assessment, since nobody had talked to Lesjack.

On September 6, Boyle sent the following email to Bud Wood, the Division HR Director in Tennessee (GC Exh. 19, p. 8). The email stated:

> Please review the attached documentation that we consider an indication of falsification of a medical record. The primary care RN, Ann Wayt, documented that she performed a head-toe assessment at 9 am when the patient did not arrive until 9:15 and 3 witnesses stated that Ms. Wayt, in fact, never conducted an assessment or even entered the patient's room until noon. Please review this documentation and provide your feedback.

Curiously in the light of this email, is the fact that the only question in this case is whether or to what extent Wayt observed the patient between 1 and 4:15 p.m. There is uncontroverted evidence that Wayt was in the patient's room and at her bedside at 10 and 11, as well as at noon. The three witnesses referred to are apparently Kress (who was only in the room for 10–20 minutes); Burgett, who apparently had no knowledge as to when Wayt was in the room and Rhonda Smith. As mentioned earlier, Smith could not and did not tell anyone that Wayt had not done an assessment, or say that Wayt did not see the patient between 11 and 12 because she was at lunch for about an hour.

On September 10, Wood forwarded Boyle's email on to Veronica "Roni" Benson, regional director, division 5, quality and clinical transformations, of community health systems. Benson responded:

> It is not uncommon to have some time discrepancies such as 9ish, 9:30 or so, I'd be interested in seeing the response to the allegation by the subject.
>
> The documentation alone is substandard and surely violates many policies on Patient Assessment, the Plan of Care, Pain Management and High Risk Assessments.
>
> I'd be interested [to] know the details on this nurse including age, tenure and prior disciplinary action. If we determine this falsification (I'm not convinced it's not plain slopplaziness) how has the facility handled the same event in the past?
>
> Seems a weak case for termination without more information.

GC Exh. 19, pp. 6–7.

Respondent did not provide Benson or anybody at corporate headquarters any information about Wayt's age, tenure, and prior disciplinary history (or lack thereof), Tr. 1092–1093. There is no evidence that Respondent considered Wayt's tenure or prior work history in deciding to fire her. Respondent's Discipline and Termination Policy states in this regard that, "the disciplinary action that is appropriate for any particular act or misconduct depends of many factors including the employee's prior disciplinary record, the seriousness of the misconduct, and the impact of the misconduct on others" (CP Exh. 5).

> Wood emailed Boyle that "we need to be able to Roni's questions."
>
> On September 11, at 9:28 a.m. Paula Zinsmeister emailed CNO Osterman. She stated:

> Time discrepancies aside, this patient was never seen by the Ortho nurse, A. Wayt until noon when she gave pain medication. In talking with Ann Wayt, she verified to the best of her recollection that she performed the head to toe assessment at 0900. There are 2 other sitter witnesses, an RN sitter and an RN Director of CVSICU in the room at admission, who verified that A. Wayt did not come in to the room from the point of admission until noon. A. Wayt documented that the head to toe assessment was performed even though the other 2 RNs indicated that she never came in the room. A third RN relieved the RN sitter for lunch from 11:30-12:00 pm and also verified that A.
> Wayt did not come into the room.[23] This third RN did stop at the nurses' station after relieving the sitter, to tell A. Wayt that the patient appeared to be in a great deal of pain. A. Wayt brought medication to the patient at noon. She did not reassess the pt's pain according to the sitter RN. The sitter was with the patient until 3:30 pm. and did not see A. Wayt during this time period.
>
> This is not an issue regarding time discrepancies. This is about the falsification of a medical record and the omission of care.
>
> Jason McDonald and I are in agreement on the above.

This email is factually incorrect in a number of respects and contains other assertions for which Respondent had insufficient information. Wayt was in the patient's room twice prior to the noon. Since Respondent had not talked to Jonalee Lesjack as of September 11, it had no way of knowing whether or not Wayt had done a headtoe assessment.

Osterman forwarded Zinsmeister's email to HR VP Angie Boyle, who forwarded it to Bud Wood and Veronica Benson. Benson replied to Boyle and Wood at 10:28 a.m. on September 11 that, "Given this information, I would support termination and notification of the State Board of Nursing." (GC Exh. 10, p. 1.) Wood replied to Boyle and Benson:

> Agreed– tell Don C that is how we wish to proceed and have him specify who should be present at that time.
>
> I infer that Don C is Respondent's counsel, Donald Carmody.

Thus, the decision to terminate Wayt was made no later than September 11, Tr. 781.[24] At this point the only management person who had spoken to Rhonda Smith was Susan Kress.[25] No management person had spoken to Lesjack. No management person had spoken to Wayt, other than on September 5, when McDonald presented Wayt with the written warning regarding the Perone incident. At that meeting McDonald told Wayt that Respondent was doing a chart audit. He did not tell her that she was under investigation for falsifying Mrs. P's chart.

There is absolutely no evidence that Wood and Benson were ever informed of the inaccuracies in Zinsmeister's email or that the decision to terminate Wayt was ever seriously reconsidered between September 11 and her termination on September 26.

On September 12, McDonald and Zinsmeister called Wayt, who was not working, and told her to come in to discuss a safety issue. Wayt asked for a "Weingarten" representative.[26] McDonald told her that the meeting was to implement discipline, not to investigate misconduct and that therefore she was not entitled to a Weingarten representative. He also told her that if she did not come in he would consider this insubordination and terminate her employment immediately.

Wayt contacted union organizer Michelle Mahon. Mahon called HR VP Angie Boyle. Boyle informed McDonald and Zinsmeister that Wayt would be allowed to have a "Weingarten" representative at her meeting with them and Boyle on September 13.[27]

Paula Zinsmeister took notes of this meeting (GC Exh. 7, pp. 11–12). Zinsmeister asked Wayt how she obtained the information for the heart, lung, and bowel sounds that were reflected on Mrs. P's chart. Wayt responded that she listened with a stethoscope for these sounds. McDonald asked, "Was this done on the patient?" Wayt responded, "If it is on there, it was done. The nursing record is fact."

Wayt conceded that she forgot to do a skin assessment on Mrs. P. Mrs. P's chart did not indicate that she performed such an assessment, therefore, there was no alleged falsification that

[23] It is unclear where Zinsmeister obtained information about the relief sitter. The record indicates that nobody had spoken to Lesjack about the events of August 28 until September 19. The email also appears to be inaccurate with respect to how long Lesjack was in Mrs. P's room. In the absence of evidence to the contrary, I infer that Zinsmeister obtained this information second hand through Kress, who had talked to Rhonda Smith, Tr. 1093–1095.

[24] I do not credit the testimony of Respondent's witnesses as to who made the final decision regarding termination. I find the record does not establish this fact. HR VP Boyle testified that Respondent's policies require corporate approval for a termination, Tr. 1057. There is no evidence regarding any communication with corporate headquarters after September 11, or after Respondent knew that some of the facts upon which corporate approval was obtained were inaccurate.

[25] The General Counsel's statement at p. 13 of its brief that no one from the hospital had spoken to Smith or Lesjack as of September 11 is thus incorrect.

[26] The term "Weingarten rights" refers to a decision of the United States Supreme Court in *NLRB v. Weingarten, Inc.,* 420 US 251 (1975), in which the Court held that the Board's construction of Section 7 of the Act, with regard to interviews with potentially disciplinary consequences, was permissible. That construction was that Section 7 creates a statutory right to refuse to submit without union representation to an interview which the employee reasonably fears may result in the employee's discipline. An employer need not allow a union representative in situations in which the employer is merely communicating a disciplinary decision previously determined, *Baton Rouge Water Works, Co.,* 246 NLRB 995, 997 (1979).

[27] Boyle had reason to change her mind about the nature of the meeting and Wayt's entitlement to a Weingarten representation apart from giving Wayt a "fair shake." Prior to the election, Respondent had a policy of conducting an investigative meeting prior to a termination, Tr. 1061–1062. By changing that policy while the Union's certification was pending on objections and/or challenges, Respondent was running the risk of committing an 8(a)((5) violation. When a Union is certified, an employer's obligation to avoid unilateral changes in the terms and conditions of unit members' employment dates back to the date of the election, *Alta Vista Regional Hospital,* 357 NLRB No. 36 (2011); *Mike O'Connor Chevrolet,* 209 NLRB 701 (1974).

she did so.

> Zinsmeister's notes go on as follows:
>
> J. McDonald informed Ann that there are 4 other witnesses that report that Ann was not in the room from the time the patient was admitted until sometime around noon when she came to give the patient pain medication.
>
> Wayt responded:
>
> Really? You are going to believe the word of those four people over the documentation in the record. One of the nurses was from CVOR and the other was Paula's friend and also from CVOR and a Director.

Although not reflected in Zinsmeister's notes, Respondent did mention on September 13 that it believed that Wayt had falsified Mrs. P's medical records (Tr. 1266).

McDonald's assertion that Wayt had not been in Mrs. P's room until noon is inaccurate. The record clearly shows she entered the room at 10 and 11. Moreover, McDonald had no basis for making this assertion, since nobody had talked to Lesjack and Smith would have told them that Wayt did come into the room at 10. The other witnesses that McDonald referred to are Kress, who was only in the room for 10–20 minutes and Burgett, who apparently did not tell Respondent anything regarding the frequency of Wayt's visits to Mrs. P.

McDonald and Zinsmeister told Wayt that she was suspended pending further investigation. Boyle asked McDonald and Zinsmeister if the investigation could be completed by Monday [September 17, 2012]. They indicated that it could. It is unclear whether or not this part of the discussion took place in the presence of Wayt and Union Representative Bob McKinney.[28] There is no indication as to what, if any further investigation Respondent planned to perform at this point.

Respondent's witnesses testified that Boyle told Wayt that she could submit information in her defense. Wayt disputes this. Since there is no indication in Paula Zinsmeister's notes that Boyle offered Wayt an opportunity to submit further evidence and documentation, I credit Wayt. I find that Boyle merely told Wayt that she would be contacted on September 17 regarding the results of the investigation. I decline to take at face value the testimony of any of Respondent's management witnesses. This record is full of testimony which is at best inaccurate by several of these witnesses. I also decline to take Wayt's self serving testimony at face value. However, given the absence of any documentation in Zinsmeister's notes regarding the offer to Wayt, I credit Wayt in this instance.

Boyle called Wayt on September 17 and told her to come to a meeting at the hospital at 10 a.m. on September 18. I find that as of September 17, Respondent had performed no further investigation regarding the events of August 28 and planned to terminate Wayt on September 18. Boyle also stated that Respondent had not received any rebuttal or defense from Wayt.[29]

Union Representative James Moy called Boyle and asked for time to submit a rebuttal or defense letter. Boyle agreed and cancelled the September 18 meeting. Wayt called organizer Michelle Mahon, who prepared the letter (R. Exh. 8), which was delivered to Respondent on September 19.

On September 24, Boyle summoned Wayt and Michelle Mahon to a meeting with Boyle and Respondent's compliance officer, Patricia Kline. Kline told Wayt and Mahon that Mahon's September 19 letter violated HIPPA.

Wayt received a voice mail on September 25, telling her to report to the hospital the next day. On September 26, Wayt went to Boyle's office where Jason McDonald, in the presence of Boyle and Zinsmeister, informed her that she had been terminated. Wayt's termination notice (GC Exh. 8) states the reasons are "substandard patient care and falsification of patient documentation."

Also on September 26, 2012, Respondent, by Bill Osterman, filed a complaint against Wayt with the Ohio Board of Nursing. The nursing board informed Wayt of the complaint on October 31, 2012. Additionally, Respondent's counsel sent Michelle Mahon a letter permanently excluding Mahon from Respondent's facility for allegedly violating HIPPA (GC Exh. 16).

Included in Osterman's submission to the Ohio State Board was all of Respondent's preliminary investigation of Wayt, some of which is inaccurate. For example, the submission included Kress' notes stating that Rhonda Smith saw Wayt only twice, the September 6 timeline erroneously stating that Wayt did not enter the patient's room until noon and Zinsmeister's notes of Jason McDonald's similar assertion on September 12. Nowhere in its submission did Respondent correct these inaccuracies It included the September 24 unsworn statement from Rhonda Smith, establishing that Wayt was in the patient's room at 10 a.m. and Lesjack's, September 24 unsworn statement which establishes that Wayt entered the room in her presence prior to the time at which Wayt administered morphine.

Ann Wayt's alleged misconduct Inadequate care

Failure to do skin assessment; failure to document skin impairments: Wayt concedes that she did not do a skin assessment on Mrs. P. Wayt never claimed to have done a skin assessment and did not indicate on Mrs. P's chart that she did so. In filling out the health history, Wayt checked a box indicating that no skin impairment was noted (GC Exh. 7, p. 17). Nurse PH, who took over from Wayt on the next shift, checked the box marked "skin intact." (GC Exh. 7, p. 21.)[30] Respondent

[28] Boyle testified, "we talked about wanting to reconvene possibly on Monday." She did not identify who she meant by "we."

[29] McDonald testified in response to a leading question, that either he and Zinsmeister or maybe just he met with Rhonda Smith on September 13 and with Jonalee Lesjack "on or around September 13, 2012." I find this testimony to be false with regard to Lesjack. There is no credible evidence that McDonald or Zinsmeister were aware of Lesjack's role in the events of August 28 until it received the Union's letter on September 19. Even with regard to Smith, it is not clear when she was interviewed by Zinsmeister and McDonald. Smith did not recall the date, Tr. 612–613, and there is no record of her meetings regarding this case other than on September 24. Several of Respondent's witnesses testified that they "re-interviewed" Lesjack after receiving the union letter, Tr. 802 (McDonald); Tr. 934 (Osterman). In fact, Respondent interviewed Lesjack for the first time after it received the September 19 letter, Tr. 965.

[30] Although Paula Zinsmeister testified that she counseled PH for this mistake, I do not credit her testimony in the absence of any documentation. Zinsmeister demonstrated a willingness to testify to events

also faults Wayt for not noticing that Mrs. P had a bruised heel. Neither did the emergency room nurses in multiple assessments over the course of 6–7 hours (CP Exh. 1, Tr. 714).

Alleged falsification of Ms. P's chart

It is patently obvious that Wayt's entries on Mrs. P's chart prior to 9 a.m. are simply mistakes, not attempts to deceive anyone. The chart as a whole, including Wayt's entries in their totality make it clear that Wayt did not see the patient prior to 10. (GC Exh. 7, p. 23.) Although Wayt made checks indicating that she checked the patient's position at 7, 8, and 9 a.m., she did not check any of the other boxes relating to "rounding" prior to 10 (or possibly 11) a.m.

Hourly rounding: Wayt's testimony is that she performed hourly rounding. Rhonda Smith testified that Wayt did not do so. Perhaps Wayt did not perform hourly rounding as Smith understands the term. However, rounding is not part of Smith's normal responsibility (Tr. 619). Moreover, there is no precise definition of what must be done to have "rounded" in this record. For example, Smith testified that it is necessary to talk to the patient to perform "hourly roundin," (Tr. 573). But when she described what she and Sam Burgett actually did in performing "hourly rounding," Smith did not testify that either she or Burgett talked the patient to determine her pain level, whether she need to be repositioned, etc. She testified that both she and Burgett merely looked at the patient's face to see if she was grimacing (Tr. 581, 583). It is not at all clear that a nurse or patient care technician must come to the patient's bedside to have "rounded."

However, it is uncontroverted that Wayt was at the patient's bedside for at least several minutes at 10 (Tr. 565–566, 571); at 11 (Tr. 639) and about noon (Tr. 601–602). Simply looking at the patient would satisfy at least three of the elements of hourly rounding; pain, position and possessions; if not all four. It is also uncontroverted that Wayt came part way into the room at 3 p.m. (Tr. 606–607).

Assuming that Wayt did not perform hourly rounding, it is also not clear that she falsified Mrs. P's chart in checking the boxes at the bottom of General Counsel 7, page 23, "Community Cares/Rounding." I credit Rhonda Smith's testimony that a Registered Nurse may document care that he or she knows was provided by another nurse or patient care technician. The rounding form (GC Exh. 7, p. 26), initialed by Smith and Sam Burgett, was posted on a communications board. Thus, if Wayt checked the hourly rounding boxes on General Counsel Exhibit 7, page 23 based on her review of the rounding sheet initialed by Smith and Burgett, it is not at all clear that this was a falsification of Mrs. P's chart. There is no evidence that when the nurse in charge of a patient checks the rounding boxes that he or she is attesting that she personally did the rounding, as opposed to attesting to the fact that rounding was done by somebody authorized to perform this task.[31]

The head to toe assessment: I cannot conclude whether Wayt performed a headtoe assessment or not. However, Respondent has not proved that she did not, and more importantly, had insufficient knowledge as to whether she did so when it decided to terminate her employment.

Evidence of Disparate Treatment[32]

GC Exh. 9 Employees disciplined but not terminated and/or terminated but not reported to the Ohio Nursing Board during the tenure of Chief Nursing Officer William Osterman

Assuming that Wayt is guilty of all the misconduct that Respondent alleges, it has, with one exception, never terminated a nurse and reported a nurse to the Ohio Board of Nursing in similar circumstances; a first offense that had no bearing on the patient's health.

This record establishes that Respondent has terminated a nurse on the first offense only once and that is the only nurse, other than Wayt, that it reported to the Ohio Board of Nursing. That nurse's misconduct was photographing a deceased patient after the patient's eyeballs had been removed for transplantation, an offense not remotely comparable to anything Wayt is alleged to have done or omitted.

Other than that one nurse, the record establishes that Respondent never terminated a nurse for a first offense. It also treated many nurses more leniently for far more serious misconduct, and for repeated misconduct. This includes nurses who falsified records and nurses whose conduct seriously threatened the health and even the life of patients.

Nurse EB

On March 5, 2013, RN EB received a second and final written warning. EB had initialed a patient's hourly rounding log, but had not completed the tasks that constitute hourly rounding. Unlike the situation regarding Wayt's patient on August 28, nobody had completed these tasks.

On November 28, 2012, EB also received a written warning. She apparently did not enter a patient's room between 10 a.m. and 9 p.m. Despite this she indicated on the patient's records that she performed hourly rounding, did a physical assessment and administered medication twice.

CNO Bill Osterman conceded that EB falsified patient records on both the March 2013 incident and the November 2012 incident. EB was not reported to the Ohio Board of Nursing, nor was she terminated for this misconduct (Tr. 1215–1217). EB's photo appeared in a picture of three nurses in the original version of the union flyer (R. Exh. 30) that was submitted to Respondent. However, the photo was cropped to remove EB from the photo in the flyer that was circulated at the hospital

---

that did not occur at Tr. 185 [Rhonda Smith told her Wayt had not done a head-toe assessment; when Smith's testimony establishes that Smith could not and did not say such a thing.]

[31] Smith testified that Wayt did not delegate her duties to Smith to round on the patient, Tr. 614. Nevertheless, Smith performed the rounding and initialing the rounding log, suggesting it was perfectly appropriate for her to do so. She also did not question the appropriateness of Burgett performing the rounding in the morning. Indeed, there is no evidence in this record that indicates that it is inappropriate for a nurse to rely on the rounding of a patient care technician, or that the nurse must perform hourly rounding if a PCT or a nurse acting as a sitter already rounded.

[32] I am identifying these nurses by initials. Since they are not directly involved in this case, I believe it is unfair to broadcast evidence of their misconduct across the Internet via Google and other search engines.

and displayed in the cafeteria (GC Exhs. 11 and 14, Tr. 1274–1275). No manager testified that they were aware that EB supported the Union at any time.

These were not the first disciplines issued to EB. On December 21, 2009, RN EB received a verbal warning for not signing off of doctor's orders on 10 patients' charts. This resulted in a medication, Lovenox, being administered when it should not have been. ER had previously received a verbal warning on August 11, 2008, for failing to transcribe a doctor's order on a patient's medical administration record. As a result the patient missed a dose.

Nurse NV

Respondent terminated NV, a registered nurse, on January 21, 2013, for failing to respond to a patient in respiratory distress. She ignored an audible alarm. Although Respondent terminated NV, it did not report her to the Ohio Board of Nursing. Moreover, NV had been disciplined several times previously. In reverse chronological order, these disciplines were:

> May 22, 2012: a third /final written warning for being rough and insensitive to a patient;
> May 4, 2012: also a third/final written warning for failing to administer medications and treatment and failure to "round" for 3 ½ hours;
> March 5, 2012: a written warning for being rude to a patient in the ICU;
> December 9, 2011, NV received a verbal counseling for telling employees not regularly assigned to her department that they could not clock in or out on department computers, telling them to use public restrooms, telling sitters they were completely responsible for a patient's care and failing to round on her patient. NV entered the patient's room once.
> In 2009, NV received a verbal warning in November and a 3-day suspension in December.

Nurse SF

On September 5, 2012, the same day that Respondent presented Ann Wayt with a verbal warning and began its investigation towards her termination, it presented SF a verbal counseling. SF failed to check the prior shift orders both at the beginning and end of her shift. As a result a patient's IV, infusing Amiodarone, remained off for 12 hours potentially injuring or killing the patient.[33]

Nurse KD

Respondent gave KD a written warning in January 2012 for failing to document the status of a patient who previously had gone into respiratory distress. Respondent also found no evidence that the patient was assessed during his last hour in the intensive care unit.

Nurse JSG

Respondent gave Nurse JSG a verbal counseling and a written warning on June 30, 2012, for two separate incidents of failing to completely document the patient's care. The incidents occurred on June 18 and 26.

Nurse ND

In August 2012, ND received a verbal counseling for failing to give a heart attack patient aspirin within the required time period.

Respondent gave Nurse ND a verbal counseling in May 2012. ND failed to adequately document the infusion rate of Heparin, a blood thinner. The improperly high infusion rate could have led to the patient bleeding to death.

Nurse BH

BH received a written warning on August 6, 2012, for failing to respond to patient call lights and IV pump alarms in the Intensive care unit. BH's supervisor verbally reprimanded her about this problem on June 30 and August 2, 2012. On August 3, 2012, BH ignored patient alarms at least twice.

Nurse LS

Respondent gave LS a third written warning on December 13, 2012 (3 ½ months after the representation election). LS failed to follow hospital policy regarding patients with low blood sugar. The patient fell shortly afterwards and LS failed to adequately document injuries resulting from the fall. On December 18, 2012, LS was placed on a PIP (performance improvement plan). Prior to this LS had received a written warning in October 2008 (failure to chart medication); a verbal warning in June 2009 (rudeness and failure to promptly administer a medication or treatment) and a verbal warning in March 2010 (not being available to help coworkers); a written warning in May 2010 (rudeness to patients and staff members, failure to co-operate with other staff). LS appears in a photo with 2 other nurses on the union flyer (GC Exh. 11). She was not quoted on the flyer.

GC Exh. 6 Employees terminated prior to September 26, 2012 during the tenure of Chief Nursing Officer William Osterman; One other nurse who was reported to the Ohio Board of Nursing

SRS: On July 5, 2012, RN SRS was terminated for failing to do an EKG on a cardiac patient, as ordered by a physician, for an entire 12-hour shift on June 26. This was the second serious patient care event by SRS within 6 weeks. On May 14, 2012, SRS was given a written warning for failing to adequately document the chart of a patient who died at Affinity on March 4.

RBo: RN RBo was terminated on April 19, 2012, for an excessive number of patient care issues. On April 13, she infused blood after being told not to do so without additional training. She also failed to properly document the infusion. On April 14, RBo left an empty blood bag and tubing in the blood warmer creating a fire risk. The same day she failed to administer medication putting a patient at risk for lethal arrhythmia. She failed to properly monitor a patient who had surgery on his urinary system. She also improperly recorded synthroid (a thyroid medication) on a patient's medical administration record (MAR) resulting in the patient not receiving synthroid at the proper time. She left empty IV bags in patient's room in violation of hospital policy. RBo also failed to notify the attending physician of a rapid response on April 14 in one of her patients.

JS: Respondent terminated JS on July 13, 2011, for photo-

[33] Amiodarone is given to patients to regulate the beating of the heart.

graphing a deceased patient during a procedure when the patient's eyeballs were being removed (assumedly for transplantation). JS in the only nurse that Respondent reported to the Ohio State Board of Nursing since August 2010, other than Ann Wayt. There is no record evidence that Respondent has reported any other nurses to the Ohio Nursing Board at any time.

LW: In January 2010, Respondent purported to terminate RN LW for walking out of a meeting with her director, leaving her patients unattended. However, LW appears to have quit her job. She was warned that if she left the meeting, her employment would be terminated. The disciplinary notice prepared for LW was for a written warning, not a termination (GC Exh. 6), p. 23–26. The meeting in question concerned LW drinking ice water at the nurses' station in violation of hospital policy, a belligerent response when reminded of the policy and failing to attend a mandatory annual skills training meeting.

EV: On May 13, 2011, Respondent terminated RN EV, who had been hired 4 days previously. She deliberately omitted that she was taking a narcotic on her employment application (GC Exh. 6, p. 20). It is not clear EV ever worked at Affinity thus the material omission on her employment application has no bearing on this case.

Legal Analysis regarding Ann Wayt's discharge and disciplinary warning

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002). Unlawful motivation and antiunion animus are often established by indirect or circumstantial evidence.

In order to make a sufficient initial showing of discrimination, the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action.

In the instant matter, it is undisputed that Ann Wayt engaged in union activity and that Respondent was aware of her support for the Union. Respondent argues that Wayt's union activity was insignificant (R. br. at pp. 38–39). However, the union flyer circulated in management meetings and the large poster displayed in the cafeteria present Wayt as the most prominent union supporter in the orthopedic unit, a unit in which support for the Union was particularly strong. There is direct evidence of Respondent's animus to union activity such as its filing of objections for which there appears to have been no basis, its refusal to bargain with the Union after it was certified, its refusal to accept the union's ADO forms and Susan Kress' reaction to the filing of those forms.

There is also a great deal of circumstantial evidence supporting a finding of animus and discriminatory motive. First of all where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised, *La Gloria Oil,* 337 NLRB 1120 (2002), enfd. mem. 71 Fed. Appx. 441 (5th Cir. 2003) (Table). By virtue of the union election flyer and the quote in support of the Union attributed to her, Respondent had reason to believe that Wayt was a leader of prounion employees in the orthopedic unit, where support for the Union was the strongest of any of the units at the hospital.

The fact that Respondent started investigating Wayt the day of the election is also sufficient to raise a rebuttable inference of discriminatory motive. This is particularly true in the absence of any actual **or** potential harm to Mrs. P or any complaints about Wayt from Mrs. P's family. I also infer discriminatory motive from that fact that Susan Kress, who this record shows harbored great animus towards the Union and its supporters,[34] began this investigation, apparently on her own volition and did not bother to ask Wayt for an explanation of her conduct. However, there are other strong indicia of discriminatory motive. One of these is that Wayt was disparately treated as compared to other similarly situated employees, *Consolidated Biscuit Co.,* 346 NLRB 1175, 1177 and fn. 14 (2006), enfd. 301 Fed. Appx. 411 (6th Cir. 2008).

Examples of similarly situated employees treated more leniently are Nurse EB who falsified patient records in November 2012 and March 2013 and was neither terminated nor reported to the Ohio Board of Nursing. One of these instances involved indicating that she did a physical assessment that she did not perform, exactly one of allegations for which Wayt was fired. Moreover, EB had a prior discipline history and indicated on the patient's chart that she administered medications that she did not give the patient.[35]

In addition to terminating Wayt for allegedly falsifying Mrs. P's chart, Respondent fired her for "substandard patient care." At pages 21–24 is a list of registered nurses who provided substandard patient care and were neither terminated nor reported to the Ohio Board of Nursing. Several of these actually put patient's lives at risk, unlike Wayt, and had prior disciplinary records, unlike Wayt.

An employer's failure to conduct a full and air investigation into an employee's alleged misconduct may, depending on the circumstances, constitute evidence of discriminatory motive, *Hewlett Packard Co.,* 341 NLRB 492 fn. 2 (2004); *Alstyle Apparel,* 351 NLRB 187, 1288 (2007), *Midnight Rose Hotel & Casino,* 343 NLRB 1003, 1005 (2004), enfd. 198 Fed. Appx. 752 (10th Cir. 2006). In the circumstances of this case, given the timing of the investigation in relation to the representation

[34] See the discussion later herein regarding the events of January 3, 2013.

[35] Respondent, at pp. 78–79 of its brief, distinguishes EB's misconduct from Wayt's alleged misconduct, stating that EB performed a physical assessment before the patient's wife arrived at 10 a.m. As in the case of Wayt, Respondent had no way of knowing whether EB performed the physical assessment or not. In fact, it had every reason to believe she did not do so. EB documented hourly rounding and a noontime administration of medication, which according to the patient's wife, she did not perform, GC Exh. 9, p. 3.

election, the evidence of disparate treatment, I find that the manner in which the investigation of Wayt was conducted does constitute evidence of discriminatory intent.

Respondent decided to terminate Wayt long before it had adequately investigated Wayt's alleged misconduct. This is shown by the fact that it did not interview Lesjack for some time after the decision to fire Wayt was made and that fact that the termination decision was made on facts that were clearly inaccurate, i.e., that Wayt did not enter the patient's room until noon. Respondent also did not give Wayt an opportunity to respond to the allegations against her before deciding to terminate her.

Finally, discriminatory motive with regard to the discharge is evidenced by Respondent's failure to follow the dictates of its own disciplinary policy, which calls for consideration of an employee's disciplinary record. Roni Benson's inquiry regarding Wayt's age, tenure, and prior disciplinary action indicates that Respondent generally considers such factors to be relevant in determining the level of discipline, particularly in deciding to terminate an employee. The fact that other managers ignored Benson's inquiry and gave no consideration to Wayt's 25 years of unblemished employment at the hospital supports a finding of discriminatory motive.[36]

In conclusion, I find that the General Counsel met his initial burden under the *Wright Line* case. The burden of proving that it disciplined and terminated Wayt and reported her to the Ohio Board of Nursing for nondiscriminatory reasons shifts to the Respondent.

Respondent failed to meet its burden of proving that it would have disciplined Wayt on September 5 or that it would have terminated her absent her union activity, or reported her to the Ohio Board of Nursing.

In order for an employer to meet its *Wright Line* burden, it does not need to prove that the employee *actually* committed the alleged offense, but must show that it had a *reasonable belief* that the employee committed the offense, and that the employer acted on that belief in taking the adverse employment action against the employee, *Midnight Rose Hotel & Casino,* 343 NLRB 1003 (2004). However, that does not mean that an employer meets its burden of proof, if despite such a reasonable belief, the preponderance of the evidence establishes that the employer would not have taken the adverse action in the absence of the employee's protected activities. Even where an employee clearly engages in misconduct, his or her employer violates the Act if, after the General Counsel meets its initial burden, it fails to establish that it would have taken such action in the absence of the employee's protected activities, *Bronco Wine Co.,* 256 NLRB 53, 54 fn. 8 (1981).

Given the inadequacy of Respondent's investigation at the time it decided to terminate Wayt, I conclude it did not have a reasonable good-faith belief that she committed many of the offenses it alleges. Most importantly, this decision to fire Wayt was made on the assumption that Wayt did not come to the patient's bedside between her admission at 9:15 until noon. That belief was clearly false.

However, I conclude that Wayt may have taken shortcuts, particularly in the afternoon, due the fact that a registered nurse was at all times standing at Mrs. P's bedside until Smith was relieved at 4:15.[37] I infer that Wayt relied on the fact that Smith was in the room and could summon her at any time in not coming to the patient's bedside every hour between 1 and 3 p.m. Nevertheless, given the overall circumstances of this case, Respondent has not come close to proving that it would have fired Wayt or reported her to the Nursing Board absent its animus towards the Union and Wayt's support for the Union. The basis for this is the same evidence on which I rely for concluding that the General Counsel made an initial showing of discrimination.

In summary, I conclude that Wayt's misconduct was a pretext to retaliate against her for her union activities. Moreover, given Wayt's 23-year spotless employment history and prominence on the union's flyer, I conclude that her discharge was also intended to coerce all the union supporters in the bargaining unit in the exercise of their Section 7 rights. Indeed, it is hard to image a more effective coercive message to the union supporters in the bargaining unit than the termination of a long-time employee with no (or no known) prior disciplinary record.

The September 5 warning was discriminatory and is additional evidence that Wayt's termination was discriminatorily motivated.

I reach the same conclusion with regard to the September 5 verbal warning. Respondent did not know that Wayt apologized to Perone when it prepared the warning. It did not know the reasons that Wayt did not immediately come to Perone's assistance and it did not care as evidenced by the fact that the warning was prepared before Zinsmeister and McDonald talked to her. Respondent concedes Wayt did not violate any hospital policy by resisting immediate reconciliation of the Pyxis machine and the warning was predicated on other assertions that may also be inaccurate, i.e., the Wayt did not assist in the reconciliation of the Pyxis machine.

Respondent also treated Wayt disparately in issuing her the written warning. Perone testified that he has reported other employees to their manager or director for being rude to him (Tr. 503). Respondent did not produce any documentation in response to the General Counsel's subpoena that any employee, other than Wayt, was disciplined due to their rudeness to Perone (Tr. 1083). That the warning given to Wayt on September 5, was motivated at least in part by her union activity is a contributing factor in my conclusion that Wayt's termination 2 weeks later was also discriminatory.

Complaint paragraph 10

Complaint paragraph 10 alleges that Respondent violated Section 8(a)(1) in withdrawing from the Union access to all

[36] Even if I were to conclude that Wayt was disciplined as reflected in R. Exh. 1, there is no evidence that anyone involved in her termination was aware of this verbal warning, considered it or relied on it. Respondent did not submit R. Exh. 1 to the Ohio Board of Nursing despite instructions on the Board's complaint form instructing it to do so, GC Exh. 7, pp. 4, 8, and 9.

[37] In light of this fact, Osterman's assertion that "patient not observed for an unsafe period of time" in the complaint to the Ohio Board of Nursing, GC Exh. 7, pp. 5–6, is at best misleading.

areas of its property. Respondent contends that it only withdrew access from a particular organizer, Michelle Mahon. It allowed Mahon and other union organizers to come inside its hospital and gave the Union access to its cafeteria, some of its break rooms and conference rooms from early July until late September 2012.

Respondent justifies barring Mahon from its facility on the grounds the Mahon violated HIPPA (the Health Insurance Portability and Accountability Act of 1996). Mahon submitted a letter to Respondent on September 19, 2012, on behalf on Ann Wayt, defending the conduct for which Wayt had been told that she might be disciplined. Mahon sent courtesy copies to other union organizers and to unit employees who are members of the facility bargaining counsel. By sending these courtesy copies, Respondent contends that Mahon divulged protected health information (PHI) and thus violated HIPPA.

The letter in question (R. Exh. 8), does not mention the name of the patient or her social security number. It does mention the fact that Wayt was assigned to this patient when the patient was in room 3420 on the orthopedic ward on August 28. The letter mentions that the emergency room nurse informed Wayt that the patient was confused and combative. This led Wayt to tell the emergency room nurse that the patient could not come to the orthopedic floor until a sitter was ordered for the patient. The letter mentions that a Dr. Rao was the admitting physician and that the patient fell and broke her hip at her nursing home.

First of all, Respondent is simply incorrect in asserting that either Mahon and/or Wayt violated HIPPA. The Federal Department of Health and Human Services has promulgated regulations to implement HIPPA. These regulations at 45 C.F.R.164.506 state that a covered entity may use or disclose protected health information for treatment, payment or "health care operations," with certain exceptions not relevant to this case. "Health care operations" are defined at 45 CFR 164.501(6). This term includes, [B]usiness management and general administrative activities of the entity, including, but not limited to: (iii) Resolution of internal grievances.

That this provision is directed to precisely that type of situation presented in Mahon's letter is explained in the preamble to final rule at 65 Fed. Reg. 82,462 at 82, 491 (December 28, 2000):

> We also add to health care operations disclosure of protected health information for resolution of internal grievances. These uses and disclosures include disclosure to an employee and/or employee representative, for example when the employee needs protected health information to demonstrate that the employer's allegations of improper conduct are untrue.[38]

Even if the disclosures in the letter could be considered to be a HIPPA violation, the letter does not present Respondent with a nondiscriminatory reason to take any action against either Wayt or Mahon and certainly not any action more stringent than a verbal warning. Patricia Kline, Respondent's HIPPA privacy officer, begrudgingly conceded that a person, even a hospital employee, who read Mahon's letter would have no way of identifying the patient without resorting to other sources of information (Tr. 1154–1160).[39] There is nothing in the record that suggests that anyone reading the letter would have a motive to seek other information with regard to the patient's identity.

Kline told Wayt and Mahon on September 24, that Respondent would normally issue a verbal warning to an employee as a result of a letter such as the one submitted by Mahon. She also conceded that because it was sent to union representatives that Respondent was justified in taking more serious measures (Tr. 1159–1160). Thus, it is clear that Respondent's action taken in response to Mahon's September 19 letter was motivated by antiunion animus and retaliation for Mahon's defense of Wayt. Setting aside the question of whether Respondent could prohibit the Union or only Mahon from its cafeteria, parking lot, etc, for nondiscriminatory reasons, I find that it violated Section 8(a)(1) in doing so for reasons unrelated to its legitimate business concerns, but rather for reasons calculated to inhibit employees' union activities, see *Harry M. Stevens Services,* 277 NLRB 276 (1985).[40]

Complaint paragraph 11: Threat for invoking Weingarten rights

I dismiss complaint paragraph 11 in which the General Counsel alleges that Respondent, by Jason McDonald, threatened Ann Wayt with termination for requesting a "Weingarten" representative. Since Respondent had already decided to terminate Wayt when McDonald spoke to Wayt on September 12, she was not entitled to a Weingarten representative, *Baton Rouge Water Works, Co.,* 246 NLRB 995, 997 (1979).

Complaint paragraph 12: Alleged interrogation by Susan Kress

Kelly Sawyer, an RN, worked in Respondent's intensive care unit from October 2012 until January 2013, when she resigned. Sawyer testified that her immediate supervisor, Susan Kress, asked her if she voted in the union election. Kress denies this. I credit Sawyer, whose credibility was not attacked by Respondent. Sawyer told Kress she wasn't employed yet at the time of the election. The complaint alleges that Kress interrogated an employee about her union interest, support, and activities. There is no evidence in the record to support these allegations and thus complaint paragraph 12 is dismissed. Moreover, I conclude that simply asking an employee if they voted, without a further inquiry, does not violate Section 8(a)(1).

[38] The Board based its decision in finding an 8(a)(3) violation in part on these regulations in *Chino Valley Medical Center,* 359 NLRB No. 111 fn. 3 (2013).

[39] Although, it is not a rule applicable to the circumstances of this case, at 45 CFR 164.514, HHS regulations state that, "health information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is not individually identifiable information."

[40] It is irrelevant to this case that Respondent barred only Mahon and not other union representatives from its premises. Board law is crystal clear that employees, unions, and employers have to the right to select whomever they choose to represent them for purposes of collective bargaining and grievance adjustment. Conversely, the other parties must deal with the other's chosen representative except in extraordinary circumstances not present in this case, *United Parcel Service,* 330 NLRB 1020 (2000).

Complaint paragraphs 13, 14, and 16: threats by Susan Kress regarding the ADO (Assignment Despite Objection) forms; retaliation by Kress in response to the submission of the ADO forms

The Union has encouraged Respondent's nurses to submit Assignment Despite Objection (ADO) forms to Respondent whenever they believe an assignment compromises patient safety, e.g., when they believe a unit is understaffed. Respondent's Chief Nursing Officer Bill Osterman has instructed his managers not to accept ADO forms. Refusal to accept the Union's forms is not a violation of the NLRA.

On January 3, 2013, Susan Kress, director of critical care services, who supervises both the intensive care unit and the cardiovascular intensive care unit, found some ADO forms in her mailbox in the intensive care unit. Kress testified that she was overworked and overtired and said to nobody in particular, "I feel like slapping these on your forehead so you can walk around and look how stupid you look with them" (Tr. 683–684). Kress also concedes that at about the same time she sent nurse Ryan Chizmadia from the intensive care unit to the cardiovascular intensive care unit.

Kelly Sawyer testified that Kress came to where she and a male nurse, who I assume to be Chizmadia, were sitting. According to Sawyer:

> And she pointed at him and she said, you, go back to your floor. Then she said that this is what's going to happen when we write her up. Now we can work short.
>
> So she had the form. She had said a few other things . . . But she turned around and kind of looked in my general direction and said that, you know, I'm going to end up, or someone's going to end up with an extra patient. Because we usually have two, and now we'll have three.
>
> And she said if you fill out one of these forms, I'm going to smash it through your forehead.

Tr. 408–409.

Sawyer then testified that Kress began looking through charts, tapping loudly upon them. Kress then brought a chart to Sawyer and asked her if she could identify the signature of the nurse who had preceded Sawyer in caring for the patient. Sawyer told Kress it was Pam Gardner. Kress replied, "I'm going to have a lot of fun writing this one up" (Tr. 410). Gardner is one of the most prominent union supporters among Respondent's nurses, and is a member of the Union's Facility Bargaining Council (GC Exh. 11, 700, 1012, 1157). Kress testified that most of the ADO forms submitted in the intensive care unit are filled out either by Gardner or Sarah Falanga (Tr. 700).

Kress testified that she sent Chizmadia from the ICU back to the CVSICU because the nurses in the CVSICU (open heart unit) were each responsible for 3 patients (Tr. 684). She denied speaking with Kelly Sawyer about the initials on patient's charts (Tr. 684). Kress did not specifically contradict Sawyer's testimony that Kress indicated that she was sending Chizmadia back to the CVSICU because of the ADO forms and that she indicated that Sawyer would have to take care of an extra patient as a result.

Based on Kress' testimony at Transcript 1246–1259 and Charging Party Exhibit 7, I credit Sawyer's testimony in its entirety and discredit Kress' account of what transpired at Transcript 684. This evidence shows that when Kress sent Chizmadia back to the CVSICU at about 11 a.m. on January 3, 2013, only one of the 3 nurses on duty in the CVSICU had 3 patients; the other 2 were responsible for 2 patients. Thus, all 3 nurses in the CVSICU were not responsible for 3 patients as Kress originally testified. She also conceded that by sending Chizmadia back to the CVSICU she created a situation in which one of the ICU nurses, which turned out to be Sawyer, would be responsible for 3 patients instead of 2, a situation Respondent tries to avoid (Tr. 1256). The patients in the ICU on January 3, 2013, were in their totality "sicker" than those in the CVSICU.

I therefore find that Respondent, by Kress, threatened employees if they submitted ADO forms, more closely scrutinized the ICU nurses' charts, implied retaliation against Pam Gardner and retaliated against the ICU nurses by sending Chizmadia back to CVSICU. I find that Respondent thus violated Section 8(a)(1) of the Act.[41]

Summary of Conclusions of Law

1. Respondent has been in violation of Section 8(a)(5) and (1) of the Act in failing to recognize and bargain with the Union, National Nurses Organizing Committee.

2. Respondent has been in violation of Section 8(a)(1) by denying the Union and union organizer Michelle Mahon access to all areas of its property.

3. Respondent, by Susan Kress violated Section 8(a)(1) on or about January 3, 2013, by threatening to plaster Assignment Despite Objections (ADO) on the forehead of any employee who submitted such a form; by more closely scrutinizing patient charts, by stating how much she would enjoy disciplining a prominent union supporter, Pam Gardner, and by retaliating against employees whom she suspected of submitting the forms by reducing the number of nurses in the ICU.[42]

4. Respondent violated Section 8(a)(3) and (1) by disciplining Ann Wayt on September 5, 2012, terminating her employment on September 26, and reporting Ann Wayt to the Ohio State Board of Nursing.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the

[41] Respondent argues that the nurses who submitted ADOs were not engaged in protected or union activity and that they were obligated to bring their grievances to Respondent's attention solely through Respondent's chain of command. There is no legal support for this position, see *Consolidated Freightways Corp. of Delaware,* 257 NLRB 1281, 1283, 1287–1288, 1292 (1981); *Yellow Ambulance Service,* 342 NLRB 804, 821–822 (2004). Indeed, a rule that requires employees to take all work-related complaints to their employer through the chain of command violates Sec. 8(a)(1), *Kinder-Care Learning Centers,* 299 NLRB 1171 (1990).

[42] The amendment to the complaint regarding Kress shredding an ADO form in front of an employee is cumulative. Moreover, it is not clear from the record who was present when Kress shredded the form.

policies of the Act.

The Respondent, having discriminatorily discharged Ann Wayt, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the Ann Wayt for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

Respondent shall formally withdraw its complaint/report/referral to the Ohio State Board of Nursing against Ann Wayt.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[43]

ORDER

The Respondent, Affinity Medical Center, Massillon, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disciplining, or otherwise discriminating (including reporting nurses to the Ohio State Board of Nursing), against any employee on the basis on their support for the National Nurses Organizing Committee (NNOC), or any other Union.

(b) Refusing to recognize and bargain with the NNOC.

(c) Denying access, previously granted, to union representatives, in retaliation for their representation activities on behalf of bargaining unit employees and motivated by a desire to inhibit employees' union activities.

(d) Restraining, coercing, or interfering, by threats and retaliation, with the union activities of employees, including when they submit Assignment Despite Objection (ADO) forms.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time and per diem Registered Nurses, including those who serve as relief charge nurses at Respondent's Massillon, Ohio hospital.
>
> The Union's certification year shall extend 1 year from the date that good-faith bargaining begins, *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962).

(b) Within 14 days from the date of the Board's Order, offer Ann Wayt full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Ann Wayt whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(d) Formally withdraw the complaint/report/referral made to the Ohio State Board of Nursing.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful September 5 discipline and the September 26, 2012 discharge, and within 3 days thereafter notify the Ann Wayt in writing that this has been done and that the discharge and September 5 discipline will not be used against her in any way.

(f) Rescind its prohibition against the Union and/or Michelle Mahon from accessing areas of it property to which the Union or Mahon was previously granted access.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Massillon, Ohio facility copies of the attached notice marked "Appendix."[44] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 5, 2012.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[43] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[44] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C., July 1, 2013.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, discipline, or otherwise discriminate against any of you (including filing a complaint with the Ohio State Board of Nursing) for supporting the National Nurses Organizing Committee, or any other union.

WE WILL NOT coerce you, by threats, retaliation, or other means with regard to your union activities, including the submission of Assignment Despite Objection (ADO) forms.

WE WILL NOT retaliate against the Union or any union representatives on the basis of their representational activities on your behalf.

WE WILL NOT refuse to recognize and bargain with the National Nurses Organizing Committee.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time and per diem Registered Nurses, including those who serve as relief charge nurses at Affinity Medical Center's Massillon, Ohio hospital.

The Union's certification year shall extend 1 year from the date that good-faith bargaining begins.

WE WILL rescind our prohibition concerning access to our facility by Michelle Mahon and/or other union representatives and WE WILL allow Michelle Mahon and other union representatives access to areas of our facility to which they were previously granted access.

WE WILL, within 14 days from the date of this Order, offer Ann Wayt full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Ann Wayt whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Ann Wayt for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, notify the Ohio State Board of Nursing that we are withdrawing our complaint/report/referral of Ann Wayt to that agency.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge and the unlawful warning given to Ann Wayt on September 5, and September 26, 2012, and WE WILL, within 3 days thereafter, notify her writing that this has been done and that the discharge and the warning will not be used against her in any way.

DHSC, LLC, D/B/A AFFINITY MEDICAL CENTER